AUG - - 2003

No. 02-954

IN THE

Supreme Court of the United States

OFFICE OF INDEPENDENT COUNSEL,

Petitioner,

v.

ALLAN J. FAVISH,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

BRIEF ON THE MERITS OF RESPONDENT ALLAN J. FAVISH

ALLAN J. FAVISH
Counsel of Record
22406 HOLLY COURT
SANTA CLARITA, CA 91390-4202
(661) 513-2068

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BRIEF ON THE MERITS OF RESPONDENT ALLAN J. FAVISH

STATUTES INVOLVED

In addition to 5 U.S.C. § 552(b)(7)(C), the following portion of the Freedom of Information Act ("FOIA"): "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b).

STATEMENT OF THE CASE

The photos are identified in the district court's order (ER 409-10) by the descriptions of the photos used in an FBI evidence receipt (ER 239, 557). The ten subject photos are among the 18 photos listed on the evidence receipt.

Favish made requests to the district court and the Ninth Circuit that if any portion of the photos is to be withheld, then those portions should be redacted and the remaining portions released.[1] Neither court addressed those requests.

After the decision by the Ninth Circuit in Appeal I (*Favish v. OIC*, 217 F.3d 1168 (9th Cir. 2000)), Favish requested that before the district court view the photos *in camera*, it allow deposition testimony of Assistant United States Attorney Miquel Rodriguez, who was in charge of Kenneth Starr's Foster investigation in 1994-95, and his former assistant. ER 220-26. Favish moved to compel that testimony. ER 411-73, 664-71. The motion was denied. ER 713. In his second appeal Favish requested that the testimony be allowed.[2] The Ninth Circuit did not address the issue.

[1] Excerpts of Record 41 (Ninth Circuit no. 01-55487) (Appeal II) ("ER"), Appellant's Opening Brief at 57-59 (Ninth Circuit no. 01-55487) (filed May 30, 2001) (Appeal II), Reply/Answering Brief of Favish at 10-11 (Ninth Circuit no. 01-55487) (filed Oct. 9, 2001) (Appeal II).

[2] Appellant's Opening Brief at 46-57 (Ninth Circuit no. 01-55487) (Appeal II) (filed May 30, 2001), Reply/Answering Brief of Favish at 2-4 (Ninth Circuit no. 01-55487) (filed Oct. 9, 2001) (Appeal II).

Appendix to Petitioner's Petition for Certiorari 1a-2a ("Pet. App.").

Prior to the decision in Appeal II, by letter dated February 22, 2002, the OIC's appellate attorney, Robert M. Loeb of the Department of Justice, told the Clerk of the Ninth Circuit that he is enclosing, under seal, color copies of the 10 photos for the court's *ex parte* in camera review in response to the Ninth Circuit's instructions, and that the OIC will bring the original photos to the oral argument for the court's inspection pursuant to the court's instructions. The Ninth Circuit requested the photos on February 20, 2002. Joint Appendix 20 ("J.A."). Mr. Loeb's letter was filed February 25, 2002. J.A. 20. Oral argument in Appeal II never occurred. J.A. 20. The original Polaroid photos were never produced to the Ninth Circuit. When Judge Pregerson refers to "the ten photographs at issue" and states that he "personally viewed the ten photographs" (Pet. App. 2a), that statement should not be construed to mean that the Ninth Circuit viewed the original photos.

On July 12, 2000, in deciding Appeal I, the Ninth Circuit reversed and remanded, and ordered the district court to view the photos *in camera*. Pet. App. 13a-14a. Based on its interpretation of the FOIA's "personal privacy" exemption (5 U.S.C. § 552(b)(7)(C)), the Ninth Circuit ordered the district court to balance the "public purpose to be served by disclosure" against the degree to which disclosure would "violate" the "memory of the deceased loved one" held by "a spouse, a parent, a child, a brother or a sister" or constitute an "invasion" of "the survivor's memory of the beloved dead." Pet. App. 13a. The Ninth Circuit stated: "The intrusion of the media would constitute invasion of an aspect of human personality essential to being human, the survivor's memory of the beloved dead." Pet. App. 13a. The Ninth Circuit also stated that the district court was to "balance the effect of their release on the privacy of the Foster family against the public benefit to be obtained by their release." Pet. App. 14a.

Unlike Lisa Foster Moody and Sheila Foster Anthony, Foster's other sister, Sharon Bowman, and his three adult children, did not intervene in this action. ER 298, 363, 612, 615.

SUMMARY OF ARGUMENT

Foster's family members have no privacy interest in the photos. If any such privacy interest is found, it is outweighed by the public's interest in disclosure. The photos will help the public determine how the government investigated and reported on this death. Redaction of the photos must be considered if any portion of a photo is to be withheld. In order to ensure that the courts are shown the original pristine versions of the photos *in camera*, deposition testimony should be taken from Miquel Rodriguez and his former assistant.

ARGUMENT

1. This Court's Precedents And Congressional Intent Establish That Foster's Survivors Have No Privacy Interest In The Photos

The OIC begins its argument by misstating the analysis that is required when determining whether documents may be withheld pursuant to Exemption 7(C). The OIC states that after a determination that the documents at issue are law enforcement records, "the applicability of Exemption 7(C) turns upon weighing the public interest in disclosure of the documents against the invasion of privacy that disclosure would cause." Brief for the Petitioner 14 ("Pet. Br."). Contrary to the OIC's statement, before any weighing occurs, it must first be determined whether there is a privacy interest to be weighed. In the present case there is no privacy interest to be weighed, and therefore, no weighing is required.

This Court has held: "Unlike scholarly commentators, we have a duty to be faithful to congressional intent when interpreting statutes and are not free to consider whether, or how, the statute should be rewritten." *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 569 n.27 (1990). Therefore, the correct interpretation of the word "privacy" as used in the

FOIA's Exemption 7(C) begins and ends with the intent of those who drafted it in 1966 and 1974. What Congress meant by that word is the central issue. The preferences of judges and litigants about whether "privacy" means something other than what it meant to the FOIA's drafters or whether there should be a FOIA exemption for "emotional distress," are immaterial. Moreover, this Court has held that to ensure maximum disclosure, the FOIA's exemptions should be narrowly construed. *Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976).

By imposing a definition of "privacy" as used in Exemption 7(C) that deviates from the intent of the Congress that created it, the Ninth Circuit violated the basic rule of statutory construction and has significantly eroded the FOIA. There are two reasons why this Court should protect the FOIA by striking down the Ninth Circuit's new definition of "privacy". First, as used in the Exemption, "privacy" only means the right to control information about oneself. The disputed photos do not contain any information about Foster's surviving family members. Therefore, the exemption is inapplicable to this case. Secondly, the new definition contradicts the primary purpose of the FOIA. By stating that "intrusion of the media would constitute invasion" of the survivors' memory of the deceased (Pet. App. 13a), the Ninth Circuit allows the Government to withhold information that in many cases will be the most deserving of disclosure because it reveals Government corruption or negligence, and therefore will attract media attention.

Interpreting the word "privacy" as used in Exemption 7(C), this Court held that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." *Department of Justice v. Reporters Committee*, 489 U.S. 749, 762-63, 764 n.16 (1989). The legislative history of the FOIA supports that definition and no other.

"Privacy" did not originally appear in Exemption (7)(C) when the FOIA was enacted in 1966.[3] The word was added to Exemption (7)(C) when the FOIA was amended in 1974.[4] The word originally was used in Exemption 6, which continues to state: "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . ."[5]

Except for the omission of "clearly", the language of Exemption 7(C) is the same as that contained in the original FOIA for Exemption 6, the exemption for personnel, medical and similar files. There is no reason to believe that when Congress added "privacy" to Exemption 7(C) in 1974 it meant for the word to have a different meaning than it did when the word was used in Exemption 6 in 1966. Therefore, the definition of the word "privacy" that Congress intended in 1966 when it used the word in Exemption 6 is the definition that Congress intended for the word as used in 1974's amendment of Exemption 7.

The legislative history of Exemption 6 establishes that Congress intended "privacy" to mean the right of a person to control information about himself. A United States Senate report on a bill that led to the FOIA states:

> Exception No. 6 relates to "clearly unwarranted invasion of personal privacy." In an effort to indicate the types of records which should not be generally available to the public, the bill lists personnel and medical files. Since it would be impossible to name all

[3] 5 U.S.C. § 552(b)(7)(C). The original FOIA is set forth in Staff of Senate Comm. on the Judiciary, Subcommittee on Administrative Practice and Procedure, The Freedom of Information Act (Ten Months Review), 90th Cong., 4 (Comm. Print 1968).

[4] Attorney General's 1974 FOI Amendments Memorandum (1975), *at* http://www.usdoj.gov/04foia/74agmemo.htm#exemption7 (last visited July 20, 2003).

[5] 5 U.S.C. § 552(b)(6); The Freedom of Information Act (Ten Months Review), *supra* n.3, at 4.

> such files, the exception contains the wording "and similar records the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."
>
> The phrase "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information. The application of this policy should lend itself particularly to those government agencies where persons are forced to submit vast amounts of personal data usually for limited purposes. For example, health, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or benefit should be disclosed to the public.

S. Rept. No. 88-1219, at 7 (1964).

The Congressional debate of the FOIA in 1966 establishes that "privacy" was intended to mean the right of a person to control information about himself. One proponent of the FOIA stated:

> We have labored long and hard to establish firmly the premise that the public has not only the right but the need to know. We have also accepted the fact that the individual is entitled to respect for his right of privacy. The question arises as to how far we are able to extend the right to know doctrine before the inevitable collision with the right of the individual to the enjoyment of confidentiality and privacy. Subsection (b) attempts to resolve this conflict by allowing federal agencies to delete *personally identifying details* from publicly inspected opinion,

> policy statements, policy interpretations, staff manuals, or instructions in order "to prevent a clearly unwarranted invasion of personal privacy." Should agencies delete *personal identifications* that cannot reasonably be shown to have direct relationship to the general public interest, they must justify in writing the reasons for their actions. This "in writing" qualification is incorporated to prevent the "invasion of privacy clause" *from being distorted* and used as a broad shield for unnecessary secrecy.

112 Cong. Rec. 13645 (1966) (remarks of Rep. King) (emphasis added).

Consistent with the legislative history of "privacy" as used in Exemption 6, Attorney General Levi's discussion of "privacy" as used in Exemption 7(C) in 1974, was predicated on "privacy" being a protection of "information about an individual" and "information about a person" without any other definition of "privacy" being advanced. *See* Attorney General's 1974 FOI Amendments Memorandum, *supra* n.4.

The Senate Report on a bill that led to the FOIA expresses the importance of having exemptions to disclosure that are clearly delineated so as to prevent the Government from expanding the exemptions beyond what Congress intended. The Senate Report states:

> Section 3 of the Administrative Procedure Act, that section which S. 1666 would amend, is full of loopholes which allow agencies to deny legitimate information to the public. It has been shown innumerable times that withheld information is often withheld only to cover up embarrassing mistakes or irregularities and justified by such phrases in section 3 of the Administrative Procedure Act as—"requiring secrecy in the public interest," "required for good cause to be held

> confidential," and "properly and directly concerned."
>
> It is the purpose of the present bill (S. 1666) to eliminate such phrases, to establish a general philosophy of full agency disclosure unless information is exempted under *clearly delineated statutory language* and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld. It is essential that agency personnel, and the courts as well, be given *definitive guidelines* in setting information policies. Standards such as "for good cause" are certainly not sufficient.

S. Rept. 88-1219 at 8 (emphasis added).

Another House Member described the importance of having exemptions that have "workable standards":

> . . . The bill would set up workable standards for the categories of records which may be exempt from public disclosure, replacing the vague phrases "good cause found," "in the public interest," and "internal management" with *specific definitions* of information which may be withheld.

112 Cong. Rec. 13642 (1966) (remarks of Rep. Moss) (emphasis added).

Therefore, non-legislative expansion of the definition of "privacy" beyond what Congress intended constitutes a violation of Congressional intent that the exemption be "clearly delineated" and "specific" so that the Government would not withhold information that should be released. Congress' definition of "privacy" as the right of a person to control information about oneself is a clearly delineated, specific definition. The definition invented by the Ninth Circuit in this case and supported by the OIC and Foster's widow and sister, and all other definitions that deviate from what Congress intended, are not "clearly delineated" or

"specific" and are not "workable". Such definitions lend themselves to the exact sort of abuse that Congress sought to end with the 1966 FOIA. Therefore, such definitions not only violate the intent of Congress regarding the definition of "privacy", but also violate Congress' intent to eliminate vague and unworkable definitions in the exemptions that can be misused by the Government.

In *Reporters Committee*, this Court expressly described only two definitions of "privacy" and neither of them was a broad right to have one's memory of a deceased family member protected. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.* at 762 (citation omitted). This first interest is classic privacy, which Charles Fried explained in his seminal law review article as "control over knowledge about oneself." Fried, *Privacy*, 77 Yale L.J. 475, 483 (1968) (quoted in *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 n.5 (3d Cir. 1980)). Fried also explained that privacy is best thought of as a subcategory of the broader interest in personal liberty: "Most obviously, privacy in its dimension of control over information is an aspect of personal liberty." *Reporters Committee*, 489 U.S. at 762. Thus, with liberty being the freedom to do things without interference, privacy is the more specific freedom to do a particular thing: control information about oneself.

When discussing this first privacy interest, this Court quoted many authorities for support of the central proposition that privacy encompasses "the individual's control of information concerning his or her person." *Id.* at 763. These quotes include: "Meaningful discussion of privacy, therefore, requires the recognition that ordinarily we deal not with an interest in total nondisclosure but with an interest in selective disclosure." *Id.* at 763 n.14 (quoting Karst, *"The Files": Legal Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 Law & Contemporary Problems 342, 343-44 (1966)). "The common law secures to each

individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. . . . [E]ven if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them." *Reporters Committee*, 489 U.S. at 763 n.15 (quoting Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198 (1890-1891)). Information is private if it is "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." *Reporters Committee*, 489 U.S. at 763-64 (quoting Webster's Third New International Dictionary 1804 (1976)). "Privacy . . . is the rightful claim of the individual to determine the extent to which he wishes to share of himself with others. . . . It is also the individual's right to control dissemination of information about himself." *Reporters Committee*, 489 U.S. at 764 n.16 (quoting A. Breckenridge, *The Right to Privacy* 1 (1970)). "Privacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others." *Reporters Committee*, 489 U.S. at 764 n.16 (quoting A. Westin, *Privacy and Freedom* 7 (1967)). "The right of privacy is the right to control the flow of information concerning the details of one's individuality." *Reporters Committee*, 489 U.S. at 764 n.16 (quoting Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 1225 (1974-1975)).

In *Reporters Committee* this Court made it extremely clear that "privacy", as that word was used by Congress in Exemption 7(C), is the right to control information about oneself and there is no support in this Court's cases for "privacy" being a right to be free from emotional distress or a right to have one's memory of a deceased family member protected from violation by media intrusion or otherwise.

The second type of privacy interest discussed in *Reporters Committee*, the interest in independence in making certain kinds of important decisions, is part of a more broadly based liberty interest that should not be described as privacy.

This became clearer when subsequent to *Reporters Committee*, this Court endorsed the proposition that the right to refuse medical care is an aspect of liberty, rather than the more narrow subpart of the liberty interest known as privacy: "Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest." *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 279 n.7 (1990) (citation omitted). This Court also recently relied on the Fourteenth Amendment liberty interest, not privacy, in *Lawrence v. Texas*, 156 L. Ed. 2d 508 (2003), in striking down a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

However, the debate over whether the freedom to do things like get an abortion, engage in certain sexual conduct, or refuse medical care, are correctly described as aspects of privacy or are better described as part of a more general liberty interest, is not essential to resolution of the present issue. The important point is that this Court in *Reporters Committee* described privacy as the right to control information about oneself and did not describe it as a broad interest in having one's memory of a deceased family member protected, from media intrusion or otherwise, or as a broad interest in freedom from emotional distress. Not only would such a broad definition of "privacy" conflict with the FOIA's basic purpose of providing a check on government corruption and negligence, as explained below, it would render the word useless since it would subsume anything that "violates" a person's memory of a deceased family member.

There is another reason why the Ninth Circuit's expansive new definition deviates from the definition of "privacy" as intended by Congress in 1966 and 1974. According to this Court, the central purpose of the FOIA is to give ordinary citizens the power to keep the Government honest in order to preserve our constitutional democracy.

Reporters Committee, 489 U.S. at 772-75. As one court explained:

> For example, the public may have an interest in knowing that a government investigation itself is comprehensive, that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner.

Stern v. F.B.I., 737 F.2d 84, 92 (D.C. Cir. 1984).

According to this Court:

> The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

However, in contravention of this Court's command to construe the FOIA's exemptions narrowly, *see Dep't of the Air Force*, 425 U.S. at 360-61, the Ninth Circuit has construed "privacy" as used in Exemption 7(C) *expansively* to allow government agencies and the courts to withhold information under the FOIA when its disclosure would "violate" a person's memory of a deceased family member, perhaps by causing the media to contact the surviving family member. Pet. App. 13a. Especially in a death case, the more the documents indicate the possibility of government corruption or negligence, the more likely it is that the media will take action that may affect the survivors' memories of the deceased if the records are disclosed. Therefore, under the Ninth Circuit's new definition, the greater the possibility that disclosure of the records will reveal government corruption or negligence, thereby fulfilling the purpose of the FOIA, the greater the reason to keep the documents from the public! This result is inconsistent with the FOIA. There is no evidence in the legislative history of the FOIA indicating that

Congress intended that the documents in a government death investigation most revealing of possible government corruption or negligence are the documents that deserve the most protection from public disclosure because they also would be the documents most likely to cause the media to affect the survivors' memories of the deceased.

The OIC tries to support its position with the following citation: "*Department of State v. Ray*, 502 U.S. 164, 176 (1991) (privacy interest includes embarrassment that disclosure could cause for returned Haitian nationals "or their families")." Pet. Br. 18; *see also id.* at 24. However, in *Ray*, this Court was discussing a FOIA request for the "unredacted interview summaries" of the government's interviews with Haitian refugees that the government had returned to Haiti. *Ray*, 502 U.S. at 168, 176. In addition to the summaries, "the names and addresses of the interviewees" were sought along with "highly personal information regarding marital and employment status, children, living conditions, and attempts to enter the United States . . . ." *Id.* at 175. Thus, the records sought included information about the interviewees' families, not only the interviewees. Therefore, this Court's comment about "embarrassment" to the families was based on the fact that the records sought in that case contained information about the families. There was no holding in *Ray* that a person has a privacy interest in a record that contains no information about that person.

The OIC states that in *Reporters Committee* this "Court explained that the privacy interests protected by FOIA are more expansive than tort-law or constitutional conceptions of privacy. *Id.* at 762 n.13 . . . ." Pet. Br. 19; *see also id.* at 24. However, footnote 13 in *Reporters Committee* does not support the OIC's statement. Instead, that footnote states: "The question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual's interest in privacy is protected by the Constitution." (Citations omitted.) The footnote is consistent

with the opinion's holding that privacy, as used in Exemption 7(C) of the FOIA, is the right of a person to control information about himself.

The OIC tries to support its position with quotes from the Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act. Pet. Br. 18. When those quotes are analyzed in context, they do not support the OIC's position. The Memorandum states:

> The individuals whose interests are protected by clause (C) clearly include the subject of the investigation and "any [other] person mentioned in the requested file." (120 Cong. Rec. S 9330 (May 30, 1974) (Senator Hart).) In appropriate situations, clause (C) also protects relatives or descendants of such persons.
>
> While neither the legislative history nor the terms of the Act and the 1974 Amendments comprehensively specify what information about an individual may be deemed to involve a privacy interest, cases under the sixth exemption have recognized, for example, that a person's home address can qualify. It is thus clear that the privacy interest does not extend only to types of information that people generally do not make public. Rather, in the present context it must be deemed generally to include information about an individual which he could reasonably assert an option to withhold from the public at large because of its intimacy or its possible adverse effects upon himself or his family.

Attorney General's 1974 FOI Amendments Memorandum, *supra* n.4.

The OIC states:

> Even when Congress narrowed Exemption 7's scope in 1974 by identifying particular

> categories of information for withholding, the reference to personal privacy in Exemption 7(C) was understood to "protect[] relatives or descendants of" persons under investigation, and to factor into the withholding decision the "possible adverse effects upon [the individual] or his family." Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 9-10 (Feb. 1975). . . .

Pet. Br. 18.

The 1974 Attorney General's Memorandum states that "relatives or descendants of" "the subject of the investigation and 'any [other] person mentioned in the requested file' are protected "[i]n appropriate situations". The Memorandum does not specify what those "appropriate situations" are. Just as with the legislative history of the FOIA, there is nothing in the Memorandum to support the proposition that such an "appropriate situation" is one where there is no information in the subject record about the relative or descendant who is alleged to have a privacy interest in the record.

Contrary to the OIC's position, the most rational interpretation of the Memorandum is that the Attorney General's reference to "appropriate situations" is to situations where the record does not mention the relative or descendant of the subject of the investigation, but still contains information about the relative or descendant that can be associated with that relative or descendant. For example, if the record contained medical information about the subject of the investigation stating that the subject of the investigation had a genetic disorder that will be passed to the subject's future children, this would involve the privacy of such future children even though they are not mentioned in the record. Another example would be where the record does not mention the subject of the investigation's wife, but the record states that the subject of the investigation has a sexually transmitted disease. This would involve the wife's privacy

because the information in the record indicates that she was exposed to a sexually transmitted disease.

The Attorney General did not cite any legislative history or any other authority to support his statement regarding relatives and descendants. Therefore, the most rational interpretation of his statement is that he intended it to be consistent with the legislative history of the FOIA.

The same is true for the Attorney General's sentence about an individual's family: "Rather, in the present context it [Exemption 7(C)'s right of privacy] must be deemed generally to include information about an individual which he could reasonably assert an option to withhold from the public at large because of its intimacy or its possible adverse effects upon himself or his family." Attorney General's 1974 FOI Amendments Memorandum, *supra* n.4. This part of the Attorney General's Memorandum states that Exemption 7(C)'s privacy interest includes "information about an individual *which he could reasonably assert an option to withhold*", which, if disclosed, can have "possible adverse effects upon" that individual's "family." In this sentence, the Attorney General was discussing the right of an individual to assert a privacy interest in a record that contains information about that individual. The Attorney General did not state that a family member of the subject of a record has a privacy interest in that record when the record contains no information about that family member.

The OIC tries to support its position with this argument: "Indeed, since FOIA's enactment, the privacy exemptions have been understood to "includ[e] members of the family of the person to whom the information pertains." 1967 Attorney General Mem. 36." Pet. Br. 18. The full quote from the 1967 Attorney General Memorandum is:

> It is apparent that the exemption is intended to exclude from the disclosure requirements all personnel and medical files, and all private or personal information contained in other files which, if disclosed to the public, would

> amount to a clearly unwarranted invasion of the privacy of any person, including members of the family of the person to whom the information pertains.

Attorney General's Memorandum On The Public Information Section Of The Administrative Procedure Act (1967), *at* http://www.usdoj.gov/04foia/67agmemo.htm (last visited July 20, 2003).

The critical issue is what the Congress understood the privacy exemptions to mean in 1966 and 1974 when it enacted those exemptions. On this critical issue, the 1967 Attorney General's Memorandum is silent because it offers no legislative history to support its statement about "including members of the family of the person to whom the information pertains." To the extent that the 1967 Attorney General's Memorandum conflicts with the legislative history of the FOIA, it should be rejected as incorrect.

The OIC cites case law and statutes from various states that restrict public access to photos of dead bodies under state freedom of information acts. Pet. Br. 24-27. Those cases and statutes are immaterial to the present case because they do not involve the definition of privacy as used in the FOIA, as intended by Congress in 1966 and 1974. Moreover, with regard to the various state statutes, they illustrate the point that if Foster's survivors and the OIC do not want the photos released to the public, they should urge Congress to amend the FOIA to add another exemption that will cover the present situation. Urging Congress to change the law is preferable over urging the courts and government agencies to misinterpret the law, as several lower federal courts have done on this issue.

The citation to *Lesar v. United States Dep't of Justice*, 636 F.2d 472, 488 (D.C. Cir. 1980) (Brief for Respondents Sheila Foster Anthony and Lisa Foster Moody in Support of Petitioner 24 ("Supporting Res. Br."), is not on point because it appears that the records in that case included information

about the family members and associates whose privacy was being protected.

2. The Public's Interest In Disclosure Outweighs Any Privacy Interest In The Photos

Assuming that a privacy interest is held to exist in this case, any balancing of that interest favors the public's interest in disclosure of the photos. There are two related areas of the Government's conduct involved in this case that should not be confused with each other. The first is the Government's conduct in investigating Foster's death. The second area is the Government's conduct in reporting the facts of the death and the investigation to the public, primarily in the Fiske and Starr reports.

The photos at issue in this case are directly relevant to both areas. For example, if the photos contain evidence that is inconsistent with suicide in the park, then the photos will establish that the Government's investigation was fundamentally flawed, either through negligence, intentional misdeeds, or a combination thereof. If the photos contain evidence that is consistent with suicide in the park, then the photos could establish that the Government's investigation reached the correct conclusion.

Likewise, if the photos contain evidence that is inconsistent with suicide in the park, then the photos will establish that the Government's reports to the public were fundamentally flawed. If the photos contain evidence that is consistent with suicide in the park, then the photos could establish that the Government's reports to the public reached the correct conclusion, despite their undisputed significant omissions and other deceptive tactics.

The problem facing the public is that the Fiske and Starr reports are so demonstrably untrustworthy that the public has no factual basis for concluding that it was suicide in the park. Based on the publicly available evidence, it cannot be proven to a certainty that the Government's investigation reached the wrong conclusion. However, it has been proven to a certainty

that the Fiske and Starr reports are deceptive and untrustworthy.

Under the FOIA's balancing process for Exemption 7(C), Favish does not have to prove that the Government's investigations reached the wrong conclusion in order to outweigh the asserted privacy interest. The public's interest in disclosure outweighs the asserted privacy interest because the Government's reports are demonstrably untrustworthy. Once the Government reports are shown to be untrustworthy, it becomes necessary for the public to see the raw evidence for itself because it cannot trust the Government to accurately and completely report on that evidence to the public. This case is a textbook example of the reason that the FOIA was enacted.

The Ninth Circuit held that "Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts" about the government's conclusion of suicide in the park. Pet. App. 11a. Although the Ninth Circuit stated "if believed," it should be emphasized that none of the evidence depends upon Favish's credibility because the evidence consists almost entirely of the government's own documents.

The number of government investigations and reports is not as important as the demonstrable credibility, or lack of credibility, of those investigations and reports. The OIC argues as if the credibility of the Government investigations is irrelevant. Under the OIC's view, it is difficult to see why there is any need for the FOIA at all because if the Government has conducted several investigations, no matter how demonstrably untrustworthy, the public has no need to see any of the hidden evidence. The OIC's view is contrary to the purpose of the FOIA.

a. Starr Concealed The Lack Of Blood Spatter

The evidence does not show what one would expect from a .38 caliber high-velocity gunshot into the mouth: massive amounts of blood coming out of the nose and mouth, broken teeth from the recoil of the gun, a significant hole in

the back of the head with lots of blood, brain and bone spatter on the surrounding area.

To the contrary, a United States Park Police officer who examined Foster's body at the park testified that he saw a "pool of blood under his head, gun in his right hand, appeared to be a .38 caliber revolver, no sign of a struggle, no other obvious signs of trauma to the body." ER 105, 109. This same officer reported that there "was no blood spatter on the plants or trees surrounding decedent's head" (ER 153) and testified that he did not observe any "blowout" from the back of the head (ER 105, 109). Additionally, a Federal Bureau of Investigation report of its interview with the only medical doctor to view Foster's body at the park says, "no blood was recalled on the vegetation around the body." ER 150. *Starr omits these observations from his report.* This omission is important because it concealed from the three-judge panel to which Starr reported and the public, significant evidence that the alleged suicide shot was not fired at the death scene. The omission also enabled Starr to avoid having to explain how the suicide in the park conclusion is consistent with this evidence.

b. Starr Concealed Evidence That Initially There Was No Gun In Foster's Hand

Although the official government story holds that Foster was found with a gun in his hand, the first person that officially found Foster's body said that there was no gun in his hand. This witness, known as the "confidential witness," testified that Foster's hands were palms-up and empty. ER 168-69. In concluding that this witness "simply did not see the gun that was in Mr. Foster's hand," Starr cited the witness' FBI interview in which the witness said that it was possible there was a gun at the back of Foster's hand that he might have missed. ER 277, 358.

But Starr failed to tell the public that one of the body site photos shows a gun in Foster's right hand that eliminates the possibility of there having been a gun at the back of Foster's hand that went unseen by the witness. This photo, leaked to

ABC-TV and published in Time and Newsweek magazine, shows Foster's gun-hand palm down (ER 178-179), while the witness said the hand was palm-up and empty. ER 168-169. This photo shows the gun underneath the palm of Foster's right hand with the back of Foster's hand facing up. ER 178-179. *The gun is in a position where the witness could not have missed it if it was there when he saw Foster's hand.* This means that the only possible condition, which the witness agreed would account for his not seeing the gun, *is a condition that did not occur*. This omission by Starr is important because it concealed from the three-judge panel and the public significant evidence that the gun was not in Foster's hand when he died. The omission enabled Starr to avoid having to explain how the suicide in the park conclusion is consistent with this evidence and helped to unfairly discredit the witness.

Starr also failed to tell the public the following: The witness testified that his concession that he could have missed seeing the gun was based on the FBI's representation that Foster's hands were palms-up with the gun concealed on the other side of Foster's hand. ER 168-169. The witness further testified that the FBI would not show him the photo. ER 168-170. But when he subsequently saw the photo he testified that it was not a picture of what he saw. ER 168-170. Therefore, Starr failed to tell the public that he relied upon a statement by the witness that the witness later testified was based on a false representation by the FBI.

c. Fiske And Starr Used An Invalid Gun Identification

Identification of the gun was a major problem for the Government. Starr failed to tell the public that an invalid gun identification from Foster's widow, Ms. Moody, was used by his predecessor, Robert Fiske, who also issued a report on the death. Nine days after the death, according to the Park Police, they showed Ms. Moody a photo of the official death gun (ER 277, 362), which is blued steel and appears black (ER 178-179). Ms. Moody reportedly said she could not identify

the gun because it was not silver and did not have a large barrel. ER 277, 362, 156. The FBI said that ten months later, in May 1994, it showed Ms. Moody the actual official death gun, not a photo of the gun, and she "believes that the gun found at Fort Marcy Park may be the silver gun which she brought up with her" from Arkansas. ER 147-149. Referring to this reported inspection of the actual gun, Fiske then reported, *without stating the gun colors*, that Ms. Moody "stated that the gun looked similar to one that" Foster owned.[6] ER 89, 92.

Fiske's use of Ms. Moody's statement clearly was deceptive. If she was shown the black official death gun at this May 1994 interview and *simultaneously* identified it as being silver-colored, then she failed to give a valid identification of the black official death gun. Likewise, if she was shown a silver-colored gun at this interview, then she failed to give a valid identification of the black official death gun. No matter what color gun Ms. Moody was shown at this interview, given her reported response, it was deceptive for Fiske to use her response as if it were a valid identification of the black official death gun.

Starr failed to explain why Fiske used Ms. Moody's invalid gun identification. Starr also failed to explain why, if Ms. Moody was shown the black official death gun in May 1994, she reportedly *simultaneously* described it as silver, without any report of the FBI agents or attorneys present saying anything about such a bizarre response.

By only reading the Starr Report, one would not know that Ms. Moody's May 1994 "identification" was invalid. This is because Starr failed to tell the public that Ms. Moody's reason for not identifying the gun in the photo

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[6] In 1998 the district court ordered the OIC to release color copies of photos of the official death gun. Now the public and this Court can see for itself if the gun is one that somebody would describe as silver as it was being shown to them. Two of the color photos of the gun released by the OIC are at Favish's web site, *at* http://www.allanfavish.com/photoix.htm (last visited July 20, 2003).

shown to her nine days after the death was because it was not silver. Also absent from Starr's report is that the FBI expressly stated that Ms. Moody believed the gun shown to her in May 1994 was silver.

The effect of Starr's omissions are to obscure the possibility that Ms. Moody was deliberately shown the wrong gun – a silver gun – in May 1994 so that there would be something in the record that could be presented as a Foster family member's "identification" of a gun, without telling the public that she had identified a gun that was not found with the body.

Starr failed to explain why Ms. Moody reportedly identified a black gun as silver, *as it was being shown to her*, in May 1994. If her description of the gun *as it was being shown to her* during the 1994 interview was erroneous, her error cannot be explained by a faulty memory. Her perception at that interview had nothing to do with memory. She was reporting her perception of a gun as it was being shown to her during the interview. Any such erroneous description only can be explained by Ms. Moody lacking an ability to tell black from silver, her lying during the interview about her perception or the FBI agent failing to accurately report what Ms. Moody said at the interview.

There is no evidence in the public record that Ms. Moody is unable to tell black from silver, that she lied about her perception or that the FBI failed to accurately record what Ms. Moody said. Moreover, had she lied about her perception of the gun *as it was being shown to her*, characterizing a black gun as silver, this should have elicited comment from those present. No such comment appears in the public record.

Starr came closest to explaining these issues when he stated that in November 1995, Ms. Moody identified "the gun recovered from Mr. Foster's hand ... although she said she seemed to remember the front of the gun looking lighter in color when she saw it during the move to Washington." ER 277, 362-63. Thus, Starr implied that there never was a

silver gun and for some unexplained reason, Ms. Moody just thought all these years that a black gun in her home was silver!

But Starr's implication that Ms. Moody has a faulty memory about the color of the gun she and her husband owned is an inadequate explanation. Starr completely failed to explain how it is possible that Ms. Moody could have been shown a black gun in May 1994 that she reportedly *simultaneously* described as silver. Again, her reported description at the May 1994 interview was not dependent on any memory of what a gun looked like when she saw it in the past. It was dependent on her ability to describe what she was being shown at the time of her description.

If she was shown a black gun at this interview, the OIC must explain why Fiske's Deputy, Roderick Lankler and Ms. Moody's attorney, James Hamilton (who represents her in the present case) and at least two FBI agents, apparently failed to note that in their presence, Ms. Moody described a black gun as being silver. The OIC also must explain why Fiske used that identification as if it were a valid identification.

Now we get into the realm of informed speculation in order to try to make sense of the known facts. Starr's failure to explain these matters suggests that the more sinister explanation is true: At the May 1994 interview, Ms. Moody correctly described the color of the gun she was shown at that interview. This is because the gun shown to her at that interview was silver and it was not the black official death gun. She deceptively was shown a silver gun it was known she could recognize so that there would be something in the record that could be presented as an "identification" of the black official death gun. Recall that nine days after the death, according to the Park Police, they showed her a photo of the official death gun (ER 277, 362), which is blued steel and appears black (ER 178-79). She reportedly said she could not identify the gun because it was not silver and did not have a large barrel. ER 277, 362, 156.

According to Starr's report, Ms. Moody "stated to the OIC in November 1995, when viewing the gun recovered from Mr. Foster's hand, that it was the gun she unpacked in Washington but had not subsequently found . . . ." ER 277, 362. However, this does not explain why Ms. Moody would have described a black gun that was shown to her in May 1994 as silver, *as it was being shown to her*. Moreover, a verbatim transcript of this November 1995 interview is not public and therefore cannot be evaluated properly.

Even if Ms. Moody's November 1995 interview provided a rational explanation, which it doesn't, Starr's report, failed to explain why it was proper for Fiske to use Ms. Moody's May 1994 "identification" as if it were a valid identification of the black official death gun. Obviously, Fiske, writing in 1994, did not have the November 1995 interview.

This is not mere insignificant "confusion" about the gun identification. It is conclusive proof that Fiske used an invalid "identification" from Ms. Moody as if it were valid and Starr's report did nothing to dispel that fact and instead gave an irrational explanation.

It also should be noted that Fiske and Starr failed to reconcile Ms. Moody's other reason for her initial failure to identify the black official death gun, i.e., because it didn't have a "large barrel" (ER 156) with their conclusion that she has identified it, despite the fact that it does not have a large barrel.[7]

These omissions by Fiske and Starr are important because they concealed from the three-judge panel and the public significant evidence that the gun allegedly found with Foster was not previously in his possession, as alleged by the Government. The omissions also enabled Fiske and Starr to avoid having to explain how the suicide in the park conclusion is consistent with this evidence.

[7] *See* Favish's web site, *supra* n.6.

d. Fiske And Starr Failed To Report That The Park Police Chief Made A False Statement About Alleged Identification Of The Gun

At a press conference on August 10, 1993, Robert Langston, then Chief of the U.S. Park Police, told the public that the Foster family had identified the official death gun as one of Foster's guns. ER 166-67. But that statement was false at the time it was made (and has never been proven true). The press conference was given by Philip B. Heymann, then Deputy Attorney General, Robert Bryant, then Special Agent in Charge of the Washington, D.C., Metropolitan Field Office of the FBI[8] and Chief Langston. ER 166-67.

By the time of the press conference, Ms. Moody had not identified the black official death gun, in part because it was the wrong color: ER 156.

By the time of the press conference, one of Foster's sisters, Sharon Bowman, failed to give a credible identification of the official death gun. ER 155, 158. The person who showed Bowman the photo of the gun wrote: "I asked if she remembered any other features [other than the wavelike detailing at the base of the grip]. She did not." ER 155, 158. So as far as Langston knew on August 10, 1993, Bowman did not even remember the color of the gun as a feature she remembered seeing. A gun "identification" that does not include the color of the gun is not an identification. Naturally, both Starr and Fiske failed to state this additional portion of Bowman's "identification" of the black official death gun.

[8] Robert Bryant was subsequently promoted to Deputy Director of the FBI, the No. 2 post in the agency. *See* Tammy M. Smith, *FBI Selects Deputy Director*, Sun Herald (Biloxi, Miss.), Oct. 2, 1997, at A3 (ER 180). Contrary to popular belief, FBI involvement in the original investigation was substantial: "There came a time when I determined that they [DOJ & FBI] were calling a lot of shots, setting up a lot of protocols." ER 124-26 (Deposition of Robert H. Hines, Commander of United States Park Police Office of Special Services).

By Aug. 10, 1993, *nobody* in the Foster family identified the black official death gun as one previously belonging to Foster. Indeed, Fiske and Starr failed to tell the public that largely because of its color, the black official death gun could not be identified by Foster's nephew, who was the surviving family member most familiar with the family's guns. ER 151-52.

Moreover, even if Bowman's statements legitimately can be characterized as an "identification," they are the only possible justification for Langston's statement. Ms. Moody had not identified it by August 10, 1993, and had in fact rejected it as being one of Foster's guns because it was not silver with a large barrel. ER 156. The surviving family member most familiar with the family's guns, Foster's nephew, could not identify the black official death gun, primarily because of its color. ER 151-52. Under these circumstances, Langston was unjustified in telling the public that the "family" thought the gun had been in Foster's possession. Starr and Fiske failed to explain why Chief Langston made this false statement. Fiske and Starr let him get away with it and the OIC defends it to this day.

e. Fiske And Starr Failed To Report Important Information About The Haut Report

Starr's discussion of the medical evidence also is deceptive. The official government story says there was no neck wound and that Foster shot himself in the mouth, leaving a one by one and a quarter inch exit hole in the back of the head, three inches from the top. ER 277, 311-12, 314. Starr dismisses a report by one of the paramedics that there was a small bullet-like entrance wound on the right side of Foster's neck. ER 277, 315.

But the only medical doctor to view Foster's body at the park, Dr. Donald Haut, wrote a two-page report that is internally inconsistent. ER 632-35. On the first page it states that the death shot was "mouth-head" (ER 634), but on the second page it states that the death shot was "mouth to neck" (ER 635). Moreover, the report appears to have been

improperly altered. On page one there is a section near the bottom of the page on the left side that states:

CAUSE OF DEATH:
PERFORATING GUNSHOT WOUND MOUTH-
HEAD

ER 634.

However, just to the left of the word "HEAD" there appears to be remnants of a four-letter word that was mostly concealed with correction fluid or tape. ER 634.

Both Fiske and Starr failed to tell the public all the important facts about this medical report. Fiske completely ignored it and Starr quoted from the apparently altered language, while failing to tell the public about the apparent alteration, and about the unaltered language mentioning a neck wound. ER 277, 308. Starr also failed to explain why the report appears to be altered and what, if anything, is written underneath the apparent alteration.[9]

f. Starr Misled The Public About Police Observance Of The Autopsy

The medical evidence was further distorted because Starr falsely implied that the Park Police observed the entire autopsy when they did not do so. Starr reported that several Park Police officers observed the autopsy, and quoted one of the officers who wrote that after he briefed the autopsy doctor, the doctor "started the autopsy." ER 277, 309. But Starr failed to tell the public that the next sentence in the officer's report states: "Prior to our arrival, the victim's tongue had been removed as well as parts of the soft tissue from the soft pallet (sic)." ER 154. Starr's omission is significant given that this is an autopsy of a man who allegedly fired a gun into his mouth while leaving behind unresolved questions about a right-side neck wound whose track might have gone through the tongue and soft palate.

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[9] *See* pages 34-35 for developments that may explain why Starr did not comment on the apparent alteration.

Additionally, Starr failed to tell the public that the autopsy doctor violated policy by beginning the autopsy before the police arrived (ER 115, 117-18) and that the autopsy doctor refused to tell the police the identity of his assistant. ER 134-35.

These omissions are important because they concealed from the three-judge panel and the public significant evidence that raises legitimate questions about the reliability of the autopsy. The natural inclination of the three-judge panel and the public is to assume that the autopsy was legitimately performed and cannot be questioned. Omitting contrary evidence gave the three-judge panel and the public a false impression that there were no legitimate questions about the propriety of the autopsy. The omissions also enabled Fiske and Starr to avoid having to explain why the autopsy doctor violated policy by beginning the autopsy before the police arrived and why he removed such crucial areas of Foster's body before the police arrived and why he refused to tell the police the identity of his assistant.

g. Starr Failed To Report Evidence That Foster's Car Was Not At The Park Shortly After The Death

Starr also omitted important evidence about Foster's arrival at the park. Starr discussed four people who were in the park between 4:30 p.m., and just before 6:00 p.m., at a time when Foster was probably already dead (ER 154, 89-90, 57, 124-26, 128, 130, 105, 107-08), and his gray car (ER 277, 299, 302, 307, 349) should have been in the park's parking lot. Starr stated that one of these people reported seeing a brown car, not Foster's gray car. ER 277, 302. But Starr failed to state that the other three people also reported seeing a brown car, not Foster's gray car. ER 137-43, 168, 172. Yet, Starr inexplicably concluded that Foster's gray car was in the lot at this time. ER 277, 307, 349.

All four of these witnesses reported seeing a brown car, not Foster's gray car, and Starr only told the public that one of these witnesses reported seeing a brown car. Starr failed to

tell the public that the other three witnesses also reported seeing a brown car.

Instead of admitting that this episode alone makes the Starr report untrustworthy, the OIC deceptively tried to make it appear that there is additional support for Starr's conclusion that Foster's gray car was in the parking lot when he died. In its motion in the district court to alter the judgment, the OIC stated that the Starr report "analyzes" the statement of "one citizen who saw a dark metallic grey Japanese sedan (Report at pp. 20-21) . . . ." ER 474, 496. However, the Starr report stated that this citizen "was shown photographs of Mr. Foster's car" and "that the license plate on it differed from that which he recalled." ER 277, 302. Therefore, in its motion to alter the judgment, the OIC implied that this citizen saw Foster's car, but failed to tell the district court that the Starr report itself reports evidence that this citizen did not see Foster's car.

It is significant that in its motion to alter the judgment, the OIC had no defense for one of the Starr report's most misleading statements. In trying to show that there were no suspicious people at the park who may have caused Foster's death, Starr referred to the statements by two of the witnesses who had reported seeing a brown car, not Foster's gray car, and stated that "[a]ccording to the reports of their interviews at the scene on July 20, 1993, C3 and C4 [the two witnesses] did not see anyone in or touching Mr. Foster's car." ER 277, 350. They did not "see anyone in or touching Mr. Foster's car" because, according to their statements, they did not see Mr. Foster's car! But Starr did not tell the public this fact. *Starr's implication that Foster's car was seen by these two witnesses is false.*

In its motion to alter the judgment, citing the Starr report, the OIC stated: "The only non-official cars positively identified and known to law enforcement and the OIC were those of Mr. Foster, and two other citizens." ER 474, 496. This proves nothing. The brown car reported by the four

witnesses and a paramedic[10] was never "positively identified" and made "known to law enforcement and the OIC," because apparently the government deliberately failed to look for the brown car. There is no evidence in the Fiske or Starr reports that the government searched for the brown car reported by all these witnesses.

These omissions by Starr are important because they concealed from the three-judge panel and the public significant evidence that contrary to the Government's story, Foster's car was not at the park when he died, thereby significantly eroding the conclusion of suicide in the park. The omissions also enabled Starr to avoid having to explain how the suicide in the park conclusion is consistent with this evidence.

h. Starr Failed To Report Evidence Refuting Henry Lee's Credibility

At this point you might be comparing Starr's OIC with O.J. Simpson's criminal defense team, and you would have good reason. Starr hired Simpson's discredited expert witness, Dr. Henry Lee.[11] Starr said Lee's examination of Foster's clothes revealed no evidence that Foster's body had been dragged. ER 277, 332, 377. But Starr failed to tell the public that according to the Park Police, they dragged Foster's body when it began to slide down the hill during an examination (ER 105, 109, 111, 146) and Starr failed to reconcile these reports with Lee's apparently erroneous conclusion. The point here is not whether the body was dragged, but Starr's omission of evidence that severely weakens Dr. Lee's credibility.

The OIC's response to this was: "Obviously Favish and Dr. Lee did not use the term 'dragged' in the same context." ER 474, 489. No further explanation was provided. Contrary

[10] Paramedic George Gonzalez, who arrived in the parking lot at 6:10 p.m., wrote within a day that he saw a brown Honda, without reporting any gray car. ER 277, 304, 124-25, 127-29.

[11] *See* Hank M. Goldberg, The Prosecution Responds: An O. J. Simpson Trial Prosecutor Reveals What Really Happened 246-70 (1996).

to the OIC's non-sequitur response, the Park Police reported that Foster's body "was starting to slide down the hill" (ER 109), "began sliding down the hill" (ER 111), "slid down" (ER 111), and was "slipping down the hill" (ER 146) in a "slide" (ER 146), which is why they "pulled him back up" (ER 111).

Starr stated, "examination of Mr. Foster's clothes by Dr. Lee revealed no evidence of a struggle or of dragging." ER 277, 377. Starr said Lee reported, "[n]o dragging-type soil patterns or damage which could have resulted from dragging-type action were observed on these pants." ER 277, 332. Starr stated, "Dr. Lee found no ripping, tearing, or scratch or scraping-type marks on the shirt." ER 277, 332. Therefore, both the Park Police and Lee are talking about the exact same thing: the movement of Foster's body across the ground. Lee found no evidence that it happened and the Park Police stated in testimony and a statement to the FBI that it happened. The OIC refused to provide a decent explanation of why it was appropriate for Starr's report to ignore the Park Police statements and treat Lee's conclusions as if they were valid.

These omissions by Starr are important because they concealed from the three-judge panel and the public significant evidence that Dr. Lee was not as competent and thorough as Starr would like the public and the three-judge panel to believe. The omissions also enabled Starr to avoid having to explain why the three-judge panel and the public should have confidence in Dr. Lee's opinions, given this major error by Dr. Lee.

i. Fiske And Starr Did Not Discuss The FBI Memo That States "No Exit Wound"

Among documents released by the FBI in late March 1998 in another Freedom of Information Act lawsuit,[12] are six pages that are on file in that case as part of the FBI's Memorandum of Points and Authorities in Support of its

[12] *Accuracy in Media v. FBI*, Civil Action No. 97-CV-02107-GK (D.D.C. 1997)

Motion for Summary Judgment, Exhibit A, Bates # 2-4, & 260-62. ER 636-41. Those six pages show the following. Two days after the autopsy, an FBI agent sent a memo to the director of the FBI stating, "Preliminary results include the finding that a .38 caliber revolver, constructed from two different weapons, was fired into the victim's mouth with no exit wound." ER 638, 641. The "no exit wound" phrase directly contradicts Starr, Fiske and the official autopsy report. ER 277, 311-12, 314.

The memo was written by an FBI agent in the Washington, D.C., Metropolitan Field Office to the Acting Director of the FBI, who was Floyd Clarke.[13] A draft of the memo is dated July 22, 1993, two days after the death and one day after the autopsy and had minor corrections made to it. ER 636-638. The final version is date-stamped July 23, 1993. ER 639-641. The memo does not appear to be an impromptu communication because it says it is, "[t]o confirm referenced telcalls, on 7/21/93." ER 636, 639. Thus, apparently it is restating information that was previously communicated by telephone.

Neither Fiske nor Starr mentioned this memo. Nor did they explain the conditions that would make it possible for a .38 revolver to be fired in the mouth without making an exit wound. Also unmentioned is whether the FBI Director did anything to resolve the contradiction between this memo and the official autopsy report of an exit wound. There is no publicly available information indicating that Fiske or Starr ever questioned the FBI agent who wrote this memo or the Acting FBI Director to whom it was sent, about this memo.

These omissions by Fiske and Starr are important because they concealed from the three-judge panel and the public significant evidence that directly contradicts the official Government conclusion about how Foster died. The

[13] William Sessions was fired from his job as FBI Director the day before Foster's death and Louis Freeh was not sworn in as Director until September 1, 1993. ER 642.

omissions also enabled Starr to avoid having to explain how the suicide in the park story is consistent with this evidence.

j. The OIC Has Never Explained Why Its Certified Copy Of The Haut Report Is Different From The Other Certified Copies Of The Haut Report

A copy of the report by Dr. Donald Haut was attached to Favish's motion for summary adjudication of issues that was filed in the district court February 11, 1998. ER 46-47. It is a copy of the Haut Report that was found in the National Archives by non-government researchers Patrick Knowlton and Hugh Sprunt. ER 44-45. At the time, it was the only publicly available version of the Haut Report. This National Archives copy was certified as a true copy on November 2, 1994, by Virginia Assistant Chief Medical Examiner Dr. James C. Beyer, who also was the autopsy doctor for Foster. ER 46, 309. Another copy of that National Archives version of the Haut Report was provided to the district court after the remand in this case. ER 634-35.

In early 2000, before the appellate decision in this case, Favish sued the OIC under the FOIA for its copy of the Haut Report.[14] In response to that lawsuit, the OIC gave Favish a copy of its copy of the Haut Report. A copy of the OIC's copy of the Haut Report that the OIC gave Favish was provided to the district court in this case. ER 643-644. The OIC's copy of the Haut Report was certified as a true copy on January 30, 1995, by Dr. Beyer. ER 643. The certified copy given to the OIC in January 1995 does not contain what appears to be remnants of a four-letter word in the front-page section next to the word "HEAD" as does the National Archives copy. ER 643, 634. Therefore, the answer to the question of why Starr never mentioned the apparent alteration is that the January 30, 1995 certified copy of the Haut Report given by Dr. Beyer to the OIC was free of the "remnants" that are clearly visible on the November 2, 1994 certified copy found in the National Archives. ER 643, 634.

[14] *Favish v. OIC*, Case No. CV 00-00009 CM (C.D.CA 2000).

Also in 2000, Charles Smith, a citizen of Virginia, made a request under the Virginia Freedom of Information Act requesting an opportunity to view the original Haut Report so that he could see if correction fluid or tape had been used on the original and if so, what was underneath any such substance. ER 600. He was not allowed to see the original version of the Haut Report and instead he was provided with copy of the report that was certified as true on March 20, 2000 by the new Assistant Chief Medical Examiner, Frances P. Field. ER 600, 645-50. A copy of this most recently certified copy of the Haut Report, along with the accompanying cover letter and authenticating statements sent to Smith, were presented to the district court in this case. ER 600, 645-50. This March 20, 2000 certified copy of the Haut Report has the apparent alteration on it. ER 646.

Therefore, here are three certified copies of the same document, the Haut Report. One copy that ended up in the National Archives was certified on November 2, 1994. ER 634. The second copy was certified on January 30, 1995 and given to Starr's OIC. ER 643. The third copy was certified on March 20, 2000 and given to Charles Smith. ER 646. The first and third copies contain what appears to be an alteration that is improper. ER 634, 646. Only the second certified copy, the one given to the OIC, fails to show this apparent alteration (ER 643) thereby raising the possibility that the copy given to the OIC was altered further, but done in such a manner as to be a "cleaner" alteration than appears on the other two certified copies.

This is very significant. Any such alteration is highly improper. A leading medical textbook states:

> When you make a mistake on a chart, correct it promptly. Never erase, cover, completely scratch out, or otherwise obscure an erroneous entry because this may imply a coverup . . . Erasures or the use of correction fluid or heavy black ink to obliterate an error are red flags.

> . . . .
>
> When you make a mistake documenting on the medical record, correct it by drawing a single line through it and writing the words "mistaken entry" above or beside it. Follow these words with your initials and the date. If appropriate, briefly explain the necessity for the correction. Make sure that the mistaken entry is still readable. This indicates that you're only trying to correct a mistake, not cover it up.

Mastering Documentation at 304-305 (Springhouse Corp., 2d ed. 1999).

The evidence is consistent with the following scenario. The original Haut Report was improperly altered with correction fluid or tape to conceal a four-letter word and replace it with the word "HEAD". The alteration was imperfect and left remnants of the four-letter word. A copy of that imperfectly altered original was given to the Senate Whitewater Committee and it ended up in the National Archives. About two months later, in January 1995, Starr's OIC was given a copy of the Haut Report by the Virginia Office of Chief Medical Examiner. But this time when a photocopy of the original was made, somebody noticed that the remnants of the improper alteration on the original were visible on the photocopy. This photocopy was altered with correction fluid or tape and another photocopy was made of that version. The result was a "clean" second-generation photocopy that did not show any "remnants" and that copy was certified on January 30, 1995 by Dr. Beyer and given to the OIC. Or Dr. Beyer certified a version that contained the remnants again and somebody at the OIC made the further alteration to clean it up. In any case, in March 2000, a first generation copy was made by the Virginia Office of Chief Medical Examiner showing the remnants, and that copy was given to Charles Smith. Obviously, the truth may be something other than this scenario. But what else is

consistent with the evidence and who is in a position to discover the truth?

Although the Virginia Office of the Chief Medical Examiner will not show the original to Charles Smith, it should show the original to the OIC. However there is no evidence that the OIC has asked to see the original. Apparently the OIC has no interest in learning whether it has been defrauded by the Virginia Office of the Chief Medical Examiner by being given a copy of the Haut Report that was improperly further altered so as to make the alteration completely "clean". Nor does the OIC apparently have an interest in learning whether the Senate Whitewater Committee also was defrauded with an imperfectly altered Haut Report.

Because the OIC filed a copy of the January 30, 1995 certified copy of the Haut Report with the district court (ER 241-45) and because it appears that this copy may be even more fraudulent than the other two certified copies, the OIC should be especially concerned about possibly having filed a fraudulently altered document with the district court. Even if the OIC is unconcerned about such a possibility, this Court may be concerned. This Court may wish to order the OIC to obtain the original version of the Haut Report from the Virginia Office of Chief Medical Examiner to determine what the truth is.

k. Fiske and Starr Concealed Important Evidence About The X-Rays

Additional documents released by the OIC prove that both the Fiske and Starr reports concealed evidence establishing that their conclusions about the lack of x-rays are not trustworthy. Moreover, the documents raise serious questions about whether the autopsy doctor and his assistant have been lying about the lack of readable x-rays. Although the documents do not conclusively resolve the matter or conclusively prove that anybody lied, the documents prove that the Fiske and Starr reports withheld critical information

from the public and the three-judge panel overseeing the OIC.

If readable x-rays of Foster's body had been taken after his death and preserved, as would be routinely done under these circumstances, many of the questions about his wounds might be answered. For example, if Foster had been shot with a .22 in the neck, that bullet may have remained in the head to be seen on x-rays. However, officially, no readable x-rays were made although Starr's report stated that, "the gunshot wound chart in the autopsy report has a mark next to 'x-rays made.'" ER 356.

Starr's report stated that the autopsy doctor, Dr. Beyer, "stated that he checked that box before the autopsy while completing preliminary information on the form and that he mistakenly did not erase that check mark when the report was finalized." ER 357.

Dr. Beyer's claim that there were no readable x-rays is contradicted by the report of a Park Police officer who attended a portion of the autopsy, and who was quoted by Starr: "Officer Morrissette's report, prepared after the autopsy, stated that 'Dr. Byer [sic] stated that X-rays indicated that there was no evidence of bullet fragments in the head.' USPP Report (Morrissette) at 1." ER 357. Starr's report then stated: "[H]owever, Dr. Beyer made that statement and reached that conclusion without x-rays." ER 357.

Starr implied that the reason for the lack of readable x-rays is that the x-ray machine was not functioning properly. Starr's report quoted Dr. Beyer as stating that "our x-ray machine was not functioning properly that day . . . ." ER 356. Starr's report stated that Dr. Beyer's assistant "recalled that, at the time of the Foster autopsy, the laboratory had recently obtained a new x-ray machine and that it was not functioning properly." ER 356. Starr's report stated, "the administrative manager of the Medical Examiner's Office recalled 'numerous problems' with the x-ray machine in 1993 (which,

according to records, had been delivered in June 1993)." ER 357.

In response to a FOIA lawsuit by Accuracy in Media, the OIC released partially redacted copies of invoices for service work on the x-ray machine.[15] The invoices show service calls on October 29, 1993 and November 8 and 12 of 1993. No invoices were produced showing any service work prior to Foster's date of death, July 20, 1993, despite the fact that AIM's FOIA request asked for all 1993 service records.[16] According to these invoices, the first service call was made more than *three months after* Foster's death.[17]

These invoices were not disclosed in the Fiske or Starr reports. These invoices undermine the claims that the x-ray machine was malfunctioning around July 20, 1993. If the x-ray machine was malfunctioning around the time of Foster's death, then where are the invoices for service work at that time? If Dr. Beyer knew before Foster died that the x-ray machine was not working properly, why did he put a mark next to "x-rays made" on the gunshot wound chart in the autopsy report and why didn't he obtain a properly working x-ray machine for this exceptionally important case? Why would the Medical Examiner's office wait more than three months after it supposedly knew its x-ray machine was malfunctioning to have service performed on the machine? Why didn't the Fiske or Starr reports discuss whether other

[15] These records were filed in August 2001 in the case entitled *Accuracy in Media, Inc. v. Office of Independent Counsel*, no. 99CV3448 (ESH) (D.D.C.). The invoices, an excerpt from the *Vaughn* index in that case and an authenticating declaration from AIM's attorney, were an addendum to a brief in the Ninth Circuit. *See* Appellant's Opening Brief in Appeal II (Ninth Circuit case no. 01-55487) (filed May 30, 2001).

[16] The request was for: "Any and all service records for the x-ray machine at the Medical Examiners Office, Northern Virginia Division located in Medical Examiners suite (1993)." Appellant's Opening Brief at Addendum (Ninth Circuit no. 01-55487) (filed May 30, 2001) (Appeal II), Clarke exhibit 2, page 3.

[17] Appellant's Opening Brief at Addendum (Ninth Circuit no. 01-55487) (filed May 30, 2001) (Appeal II), Clarke exhibit 1, pages 1-3.

autopsies by the Virginia Office Of Medical Examiner during 1993 had any x-ray problems?

A legitimate question exists about whether the x-ray machine was functioning properly when Foster died and whether a cover story has been concocted to hide the fact that x-rays were taken, but later destroyed because they showed something inconsistent with the Government's official story of the death.

3. The Photos Will Help The Public Determine How The Government Investigated And Reported This Death

The photos will either be consistent with the Government's reports and other publicly available evidence from the Government, or they will be inconsistent with those reports and evidence. Because the Fiske and Starr reports have no credibility, the public must see the photos to make this determination. The OIC fails to explain why photos of a body that has been mysteriously shot reveal nothing about the quality of the investigation into that death or the quality of the Government reports to the public about that death.

a. The Leaked Gun-In-Hand Photo

The district court ordered that the photo entitled "1 – Right hand showing gun & thumb in guard" should be released.[18] ER 410. The Ninth Circuit affirmed this ruling. Pet. App. 2a. The original of this photo is important because there is controversy about why the gun would have remained in Foster's hand had he shot himself. Both Fiske and Starr said that the gun remained in his hand because Foster's thumb was trapped and compressed between the trigger and the trigger guard of the gun. ER 610-11, 616, 620. The publicly available "leaked" published copy of the photo is too degraded to make a definitive evaluation of whether Foster's thumb was extended through the trigger area past the joint on his thumb to cause the gun to stay in his hand. The original of this photo would provide a much better view of his thumb and the trigger area.

[18] Published color copies of the photo are at ER 178 & 179.

Also, common sense tells us that the explosion of supersonic gasses from a .38 high velocity gunshot into the mouth is likely to cause a "blowback" of blood and other organic matter out of the mouth and onto Foster's gun, hand and sleeve. Indeed, Starr quotes Dr. Henry Lee as saying that he examined the photos taken at the park and found "blood spatters" on Foster's hands and shirt. ER 616, 621. Starr quotes Lee as saying that this "backspatter" is typical. ER 616, 621. The original photo will allow the public to see if there is any such backspatter.

There also is a question about why the gun appears to be partially lodged under Foster's leg. If he shot himself with that gun while sitting on the ground, how did it get under his leg? The original photo will provide a more detailed view and allow a better evaluation of whether the gun is lodged under his leg.

Although the degraded published version of the photo was not officially released, the fact remains that any privacy interest in the original is virtually nil because ABC, Time and Newsweek have given the published version far greater exposure than Favish could ever give any version he might receive.

b. The Photo Entitled "5 – VF's body – focusing on the Rt. side shoulder/arm"

The district court ordered that the photo entitled "5 – VF's body – focusing on the Rt. side shoulder/arm" should be released. ER 409. The Ninth Circuit affirmed this ruling. Pet. App. 2a.

In its motion to alter the judgment in the district court, the OIC stated that this photo shows "blood stains and/or blood . . . ." ER 482. This photo may help solve the mystery about blood flow patterns and an alleged neck wound that officially did not exist.

As Starr stated, paramedic Richard Arthur, "initially said he saw what 'appeared to be a bullet wound, an entrance wound' on the neck." ER 277, 314-15. Unstated by Starr is that Arthur testified he was 2-3 feet away from Foster when

he observed the alleged bullet neck wound on the right side of Foster's neck, around the jaw line and underneath the right ear. ER 119-20, 122-23. But, citing a *nonpublic* FBI report, Starr said that Arthur told the FBI in 1996 that *autopsy photos* (not the photos taken at the park) Arthur examined were taken from a better angle and a better view than what he had at the park and he may have been mistaken about such a wound. ER 277, 314-15. The public has no way to verify whether Arthur was shown pristine original autopsy photos of Foster. The OIC now states that Arthur "recanted" in 1996. Pet. Br. 37 n.22. Arthur did not recant. According to Starr, Arthur said he *may* have been mistaken. The reader can judge for himself whether Arthur "recanted" or after three years of the Government questioning him, he finally just gave them enough to make them stop while maintaining his own dignity.

The alleged neck wound also is discussed in two books by major United States publishers.[19] These books allege a story of illegal conduct by certain members of the OIC and the FBI in trying to prevent proper enlargement and examination of the pristine original of at least one of the six Polaroid photos not ordered released. *Id.* Allegedly, this was done to conceal a neck wound that officially did not exist. *Id.* The books allege an effort to illegally obstruct the work of Assistant United States Attorney Miquel Rodriguez and his former assistant Lucia Rambusch while they were working on the Foster death investigation at the OIC.[20] *Id.* One of the authors of the two books, Ambrose Evans-Pritchard, stated in a declaration, "I have seen the photograph showing an

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[19] ER 423-30 (Christopher Ruddy, The Strange Death of Vincent Foster: An Investigation 163-65 (The Free Press, a division of Simon & Schuster, Inc., 1997)); ER 423, 431-53 (Ambrose Evans-Pritchard, The Secret Life of Bill Clinton: The Unreported Stories 135-53 (Regnery Publishing, Inc., 1997)).

[20] The OIC cites http://www.fbicover-up.com (Pet. Br. 30 n.17) that contains links to unathenticated audio recordings purporting to be of Rodriguez.

apparent neck wound to Foster's neck . . . ." ER 601, 656, 662.

It is undisputed that one of Starr's experts reported seeing dried blood on Foster's neck in an *autopsy* photo, supposedly taken after the body was washed, and the location of that dried blood coincided with the location of the alleged neck wound reportedly seen by a paramedic at the park and allegedly visible in an enhanced copy of the original photo. ER 277, 345. There is nothing in the Starr Report indicating that this expert viewed the original Polaroid photo at issue here that is alleged to show a neck wound when enhanced or explaining why this expert was not shown this photo.

Moreover, Starr discussed blood draining from Foster's "right nostril" and "right side of the mouth." ER 277, 345. Starr stated that many witnesses who saw Foster at the scene described his head as "facing virtually straight, not tilting noticeably to one side or the other." ER 347. Starr also discussed "a blood transfer stain in the area of the right side of the face" that Dr. Lee allegedly concluded was made when Foster's "head made contact with the right shoulder at some point before the Polaroids were taken" (ER 277, 347) thereby causing a blood stain to transfer from Foster's shoulder to his cheek.

Starr was unable to explain how this happened and could only speculate about who might have moved Foster's head because none of the Park Police or paramedics who were among the first to see Foster's body at the scene stated that they moved Foster's head. ER 277, 347. Neither Fiske or Starr was able to definitively state how Foster's head made contact with his right shoulder and then returned to a straight-up position to leave the transfer stain on his cheek. Starr implied that the blood on Foster's right shoulder came from the blood draining from the nostril and mouth. ER 277, 344-347. Thus Starr implied that the blood draining from the nostril and mouth came first and then stained the shoulder, and then the transfer stain was made on the cheek *over* the blood trail from the nostril and mouth.

However, more recently released evidence from Dr. Lee's report for Starr demonstrates that Starr's implied scenario did not happen. The new evidence raises questions about whether the head was moved more than once and whether the blood on the shoulder initially came from a neck wound, not the mouth, and whether somebody tried to conceal the blood flow from the neck by tilting the head to spill blood from the mouth over the right side of the neck.

According to Lee's report: "A portion of the blood trail from Mr. Foster's mouth appears to have been deposited on top of the transfer pattern after his face was separated from the shoulder region." ER 601, 654-655. *Starr failed to tell this to the public*. Starr led the public to believe that blood drained from Foster's nostril and mouth and stained his shoulder. Then, Starr implies, some unknown person tilted Foster's head so that the right cheek touched the blood on the shoulder and then that person moved Foster's head off the shoulder back to the straight-up position, leaving the transfer stain on the cheek.

Starr did not tell the public that Lee stated that *after* this transfer stain was made, more blood drained from Foster's mouth. How could more blood have drained from Foster's mouth at that point, unless somebody tilted his head again? Presumably his heart had long since stopped beating and at least some of the blood had already drained from his mouth to stain the shoulder.

Starr does not tell us what caused the flow of blood out of Foster's mouth that is described by Lee as going on top of the transfer stain on Foster's cheek. Given Starr's failure to explain this second blood flow, to fit the facts reported by Lee, it appears that one has to assume that the head was moved for a second time. This second movement means that after whomever moved Foster's head the first time, someone (who presumably had no business moving the head of a man known to be dead at a possible crime scene) moved the head with the result that blood streamed down the right side of the head and onto the neck and shoulder. *Therefore, we now have*

evidence for a possible second movement of Foster's head that Starr failed to report.

This leaves the American public in a position of having to make educated guesses with insufficient evidence about what happened. The public should not have to do that. One educated guess is that the shoulder became stained with blood that was draining from a right-side neck wound (that officially did not exist). Then some unknown person moved Foster's head, causing the right cheek to touch the bloodstained right shoulder, thereby creating the transfer stain on the right cheek, and then moved his head back to the straight-up position. Subsequently, somebody moved Foster's head for a second time to the right in order to spill some blood that was collected in the mouth out the right side of the mouth to cover the blood trail that was coming from the neck and make it appear that all the blood was originating from the mouth and nostril, and none from the neck.

Such an educated guess is consistent with something else Lee stated *that Starr did not tell the public*: "A pool of blood appears to be directly under the right side of his neck and shoulder region." ER 601, 654, 655. Unfortunately, the public is left to this sort of educated guessing because the government has not dealt with the public honestly. We know that Lee told Starr that the contact stain was created before the blood trail from the mouth, implying that they were caused by two separate events. *We know that Starr failed to tell this to the public*. We also know that neither Lee nor Starr offered any explanation of how this happened.

The public must see these photos so that the public can provide the careful analysis that the government failed to provide. Perhaps the photos will show whether the amount of blood that pooled under the right side of the neck and shoulder region, as reported by Lee *and concealed by Starr*, is too great to have come from the mouth and nostril, thus indicating it came from the neck.

We are dealing with a mystery. By nature, we don't know all the answers. We do not know all the right questions

to ask. Public release is the only way to ensure that these photos are given the scrutiny they deserve.

c. The photo entitled "8 – VF's face - Taken from right side focusing on face & blood on shoulder"

The district court ordered that the photo entitled "8 – VF's face - Taken from right side focusing on face & blood on shoulder" should not be released. ER 410. The Ninth Circuit affirmed this ruling. Pet. App. 2a. This may be the controversial alleged neck wound photo allegedly taken by Park Police Officer John Rolla. ER 431, 440, 557. Very possibly, the Foster death controversy can be ended with release of the neck portion of this photo so that it may be blown-up or enhanced. For the reasons discussed above, this photo should be released.

d. The Other Photos

All of the other photos should be released because they may help solve the undisputed mystery about the blood flow patterns discussed above.

4. *AIM v. National Park Service* Was Wrongly Decided

In *Accuracy in Media v. National Park Service*, 194 F.3d 120 (D.C. Cir. 1999), the D.C. Circuit denied a FOIA request for access to *copies* of the photos at issue in the present case.[21] (It is common knowledge that copies of Polaroids have less detail than the original photos.) In so doing, the D.C. Circuit never relied on a right of Foster's survivors to have their memory of him protected from violation. In a hopelessly confused opinion, the D.C. Circuit stated that its decision *did not* decide whether Foster's survivors or even Foster himself had a privacy interest in the photos! *AIM*, 194 F.3d at 123. By denying that it decided an issue that was central to the case, the D.C. Circuit destroyed the credibility of its opinion.

Moreover, in *AIM* the D.C. Circuit used an incorrect standard:

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[21] The OIC is in possession of the original photos at issue here. ER 237.

> To show that the invasion of privacy was not "unwarranted," AIM must show "compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the [photos] is necessary in order to confirm or refute that evidence."

AIM, 194 F.3d at 124.

This is an improper standard. Exemption 7(C) states that disclosure may be denied when it would lead to an "unwarranted" invasion of personal privacy. The Exemption does not say anything about having to produce "compelling evidence" in order to make the invasion "warranted" or that it must be evidence of "illegal activity" in order to make the invasion "warranted". This Court has held that the FOIA's exemptions must be narrowly construed to promote the FOIA's purpose of government disclosure. *See Dep't of the Air Force*, 425 U.S. at 360-61 (1976).

By imposing the additional burdens of "compelling evidence" and "illegal activity" for those trying to show that the public interest in disclosure of a particular record is paramount to the privacy interest of a single person or a few persons, the D.C. Circuit gave the privacy exemption a broad construction that has no basis in the statutory language or Congressional intent. The D.C. Circuit never explained how its standard is consistent with the FOIA as interpreted by this Court. For example, why require evidence of illegal activity when the public also has an interest in discovering negligent government activity?

5. If Any Portions Of The Photos Are To Be Withheld, The Court Must Consider Redaction Of The Photos

"Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Therefore, if it is determined that Foster's survivors have a privacy interest in a photo, and that after that interest is balanced against the public's interest in disclosure it is determined that the photo cannot be released

in its entirety, the Government only is authorized to withhold those portions of the photo that would violate the survivors' privacy interest.

Favish made requests to the district court and the Ninth Circuit that if any portions of the photos are to be withheld, then those portions should be redacted and the remaining portions released.[22] Neither court addressed those requests.

It is common practice for the government to disclose text documents pursuant to the FOIA with exempt information redacted. This allows the nonexempt portion of the document to be disclosed, in conformity with 5 U.S.C. § 552(b). There is no reason why image documents, like Polaroid photos, should not also be subject to redaction when they include information that is exempt from disclosure and information that is nonexempt. Under the FOIA, the Government is required to release all nonexempt information.

If it is determined that Foster's survivors have a privacy interest in any of the photos, no matter what definition of "privacy" is used to reach that determination, it is inconceivable that everything in the withheld photos, if disclosed, would fall under that definition of privacy. For example, if it were ultimately held that a particular view of Foster's face, or portion thereof, was an element that would make a photo unsuitable for release, then that photo can be redacted to omit the offending element without altering the original photo, so as to allow release of the rest of the photo.

Such redaction would be especially appropriate with at least one of the five photos the district court refused to order released. That photo, *after being enlarged*, may depict the alleged neck wound described in the books. This photo is described as "8 - VF's face - Taken from right side focusing on face & blood on shoulder. . . ." ER 410. The book

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[22] ER 41, Appellant's Opening Brief at 57-59 (Ninth Circuit no. 01-55487) (filed May 30, 2001) (Appeal II), Reply/Answering Brief of Favish at 10-11 (Ninth Circuit no. 01-55487) (filed Oct. 9, 2001) (Appeal II).

excerpts discuss a Polaroid photo that, *when enlarged*, reveals a neck wound that officially did not exist, despite a report of such a wound by at least one paramedic at the scene (ER 277, 315) and a report by Starr's expert, Dr. Blackbourne, of dried blood at the same location on Foster's neck when the surrounding blood had been washed away during the autopsy. ER 277, 345. One of the book authors stated in a declaration that he saw the photo and a neck wound is apparent. ER 601, 656, 662.

Additionally, Starr's expert, Dr. Lee made a statement in his report that Starr failed to discuss in his report. Lee stated: "A pool of blood appears to be directly under the right side of his neck and shoulder region." ER 601, 654, 655. This particular photo appears to be the photo discussed in the books because one of the book excerpts states that the photo was taken by Park Police Officer John Rolla (ER 431, 440) and this photo is identified as having been taken by Rolla. ER 557.

The district court withheld this photo because it is "so explicit as to be not discoverable as it clearly violates the privacy of the survivors." ER 410. It is unclear from the district court's ruling whether partial redaction of the photo, perhaps of the face area or portion thereof, while leaving the neck area visible, would make it appropriate for release, given the public's interest in seeing whether the alleged neck wound exists. There is nothing to indicate that release of such a redacted photo, showing only the neck area of the body, which officially did not have a wound, would violate whatever privacy interest may be found to exist to such an extent that the public should be denied the opportunity to see for itself if this alleged neck wound exists. The OIC contends that there is no such neck wound. How can a photo, with the face redacted, showing only what the OIC contends is an unwounded neck with a trail of blood, be a significant assault on whatever privacy interest may be found to exist?

By failing to consider partial redaction of the withheld photos the district court and the Ninth Circuit wrongfully

denied disclosure of the nonexempt information in those photos, in violation of the FOIA.

6. The Deposition Of Miquel Rodriguez Should Be Taken

In order to ensure that the courts are shown the original pristine versions of the subject photos *in camera*, deposition testimony should be taken from Assistant United States Attorney Miquel Rodriguez. *See* ER 411-73, 664-71.

CONCLUSION

All of the photos should be released to the public. Foster's family members do not have any privacy interest in the photos. However, any privacy interest they may have in the photos is diminished by the fact that he was a high-ranking Government employee. Obviously the public has an interest in examining how its employees investigate deaths. But that interest is greater when the deceased is a person of Foster's position. When a high-ranking government employee dies a violent death, the public has a right to know if that death occurred in the manner claimed by the Government.

Apart from the tragedy of Foster's death, Foster's family has been denied the closure that any family would desire. However, the blame for this lack of closure does not lie with those who are seeking the truth in order to keep their government honest. It lies with government officials who have produced reports about the death that have no credibility. This case is what the FOIA is all about.

Respectfully submitted.

ALLAN J. FAVISH
Counsel of Record
22406 HOLLY COURT
SANTA CLARITA, CA 91390-4202
(661) 513-2068
Counsel for Respondent

August 2003